

Mingtree Restaurant, Inc. d/b/a Forbidden City Restaurant and Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 20, AFL-CIO. Case 19-CA-13092

November 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On March 29, 1982, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in opposition thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mingtree Restaurant, Inc. d/b/a Forbidden City Restaurant, Puyallup, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly:

"(a) Polling or otherwise interrogating its employees to ascertain their union views in the ab-

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

² The Administrative Law Judge correctly placed primary reliance on *Jackson Sportswear Corporation*, 211 NLRB 891, fn. 3 (1974), for his finding that Respondent violated Sec. 8(a)(1) and (5) by polling its employees at a time when it did not possess sufficient objective evidence to support a reasonable doubt of the incumbent Union's majority status. The Administrative Law Judge, however, also cites *Taft Broadcasting, WDAF-TV, AM-FM*, 201 NLRB 801 (1973), to support a proposition analogous to the contrary of his finding. We distinguish *Taft*. There the outcome of an employee poll was but one factor underlying the Board's finding that the employer had a sufficient basis for doubt of the union's majority status at the time recognition was withdrawn. Here, the factors relied on by Respondent as indicating a lack of majority support are insufficient to justify the taking of the poll itself in the first instance.

³ We shall modify the provisions of the Administrative Law Judge's recommended Order to provide a cease-and-desist remedy for the 8(a)(1) and (5) violations found by him with respect to Respondent's polling of its employees.

sence of objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of its employees."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT poll our employees or otherwise ask them about their union views in the absence of objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of our employees.

WE WILL, upon request, bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 20, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described below. If an agreement is reached, we will, on request, sign such an agreement. The appropriate unit is:

All employees at our Puyallup, Washington, restaurant but excluding clericals, janitors, managers, owners, supervisors and guards as defined in the Act.

MINGTREE RESTAURANT, INC. D/B/A
FORBIDDEN CITY RESTAURANT

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: On December 22, 1981, the parties jointly served upon the Deputy Chief Administrative Law Judge a motion for transfer and stipulation of facts. Thereafter, on January 14, 1982, an order granting the motion was issued by me, and a date for the filing of briefs was set. Pursuant to the foregoing motion and order, this matter was submitted to me for decision, the parties having waived a hearing.

The charge was filed on December 29, 1980, by Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 20, AFL-CIO (herein called the Union). Thereafter, on April 8, 1981, the Acting Regional Director for Region 19 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Mingtree Restaurant, Inc. d/b/a Forbidden City Restaurant

(herein called Respondent), of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein called the Act).

Following the submission of this matter to me, both counsel for the General Counsel and counsel for Respondent, on February 25, 1982, filed briefs in support of their respective positions.

Upon the entire stipulated record, and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Washington corporation engaged in the restaurant business in Puyallup, Washington. In the course and conduct of its business operations, Respondent has annual gross sales in excess of \$500,000, and annually purchases goods and materials in excess of \$50,000 directly from sources outside the State of Washington, or from suppliers within said State which in turn obtained such goods and materials directly from sources outside the State. It is admitted, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, conducting a private poll of its employees' desire for continued union representation, and thereafter refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees.

B. *The Facts*

The stipulated facts herein are, in pertinent part, as follows:

The Union was voluntarily recognized by Respondent at one of its Chinese restaurants known as the Forbidden City Restaurant in Puyallup, Pierce County, Washington. Prior to this voluntary recognition in 1971 and thereafter, the employees of the Forbidden City Restaurant had never expressed a desire to be represented by the Union, no election was ever held to determine whether the Union would be the representative of the employees, no request to bargain was received, and no authorization cards were signed.

After initial recognition in 1971, Respondent became a "me-too" signer of successive collective-bargaining agreements negotiated by the Union and the Pierce County Restaurant Owners Association. These successive agreements contained union-security clauses requiring compulsory union membership or discharge, together

with provisions for various pension and health and welfare trusts funded by per-hour contributions by Respondent. The most recent agreement expired on August 1, 1980.

In late July or early August 1980, O. W. Hollowell was retained as labor counsel for Respondent. On August 13, 1980, Hollowell met with representatives of the Union and informed the Union of his authorization to negotiate for Respondent as well as another restaurant operated by the Great Orient West Corporation, not involved herein. The parties exchanged proposals and agreed to meet again on September 8, 1980.

On September 5, 1980, an RM petition was filed on behalf of the Great Orient West Corporation (Case 19-RM-1664). At the meeting on September 8, 1980, the parties agreed to further suspend negotiations pending resolution of the Great Orient West Corporation's RM petition. On October 24, 1980, an RM petition was filed on behalf of Respondent (Case 19-RM-1668).

In early November 1980, Respondent was informed by Regional Office that its RM petition was going to be dismissed for insufficient objective considerations. This petition was subsequently withdrawn by Respondent. The insufficient objective considerations submitted by Respondent included affidavits of the manager and floor manager of the restaurant stating in essence that:

- (1) Only 20%—30% of the employees were union members;
- (2) Eight (8) cooks and six (6) waitresses, out of a work force of about 28 employees, expressed strong anti-union sentiments;
- (3) Increased reports of anti-union sentiments;
- (4) High employee turnover;
- (5) No grievance history.

On November 9, 1980, the Union made a written request to Respondent for a renewal of bargaining. On December 5, Respondent caused a secret-ballot election to be conducted at Respondent's premises by the Certified Public Accounting firm of Hubbard & O'Connor. There were 26 employees eligible to vote; 8 voted for the Union, 14 voted against the Union, and 4 did not vote. There is no contention of impropriety regarding the manner in which the employees were apprised of the election, or in the conduct of the election or tally of ballots.

On December 8, 1980, Hollowell informed the Union that bargaining would proceed on behalf of the Great Orient West Corporation but that Respondent herein refused to bargain further with the Union because the above poll indicated the Union failed to represent a majority of its employees. At all times since, Respondent has refused to bargain with the Union for a contract covering its employees.

C. *Analysis and Conclusions*

The applicable law governing an employer's withdrawal of recognition is succinctly summarized in *United Supermarkets, Inc.*, 214 NLRB 958 (1974), enf'd. 524 F.2d 239 (5th Cir. 1975). There, the Board states:

On the basis of well-established law, the Union's contractual relations give rise to a presumption of majority status that continues after the expiration of the contract. In the face of this presumption, Respondent's withdrawal of recognition must be found unlawful unless (1) competent evidence established that the Union no longer commanded a majority as of date of Respondent's refusal to bargain, or (2) Respondent had a reasonable doubt based on objective facts as to the Union's continuing majority status. A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of the employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the union has lost its majority status.

* * * * *

The crucial question is whether a majority of employees have expressed dissatisfaction with the Union as their collective-bargaining representative

....

The thrust of Respondent's defense is predicated upon its initial recognition of the Union in 1971 and the simultaneous entering into a contract containing a union-security clause. Thus, Respondent, contending that the Union was unlawfully recognized in 1971, argues that the maintaining of a contract with a minority union which contains a union-security clause constitutes a continuing violation of the Act and creates a presumption that any subsequent acquisition of majority status is attributable to the earlier improper recognition.

This precise argument has been clearly rejected, and it has been consistently held that an employer may not withdraw recognition from a union based on an unlawful recognition which occurred outside the 6-month statute-of-limitations period as set forth in Section 10(b) of the Act. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO [Bryan Manufacturing Co.] v. N.L.R.B.*, 362 U.S. 411 (1960); *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975), and cases cited therein; *Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe's Nugget*, 227 NLRB 357 (1976), enfd. 584 F.2d 293 (9th Cir. 1978); *Morse Shoe, Inc.*, 231 NLRB 13 (1977), enfd. 591 F.2d 542 (9th Cir. 1979). Thus, Respondent's argument is clearly without merit.

Respondent does not contend in its brief that the objective considerations enumerated in the above stipulation of facts were legally sufficient to support a reasonable doubt as to the Union's continuing majority status, or that the Regional Director erred in concluding that the RM petition should be dismissed because of a deficiency in Respondent's proffered objective considerations. Indeed, Respondent elected not to except to the Regional Director's determination, and withdrew its petition upon being advised that, absent withdrawal, the petition would be dismissed.

Moreover, clear case precedent establishes that certain factors relied on by Respondent to show loss of union

majority are insufficient to warrant the withdrawal of recognition. Thus, neither a showing that less than a majority of employees are members of an incumbent union,¹ high employee turnover,² or the mere fact that there has been "no grievance history,"³ provides the necessary degree of evidence.

The stipulation of facts includes the following:

The insufficient objective considerations submitted by the Employer included affidavits of the manager and floor manager of the restaurant stating in essence that:

* * * * *

(2) Eight (8) cooks and six (6) waitresses, out of a work force of about 28 employees, expressed strong anti-union sentiments;

(3) Increased reports of anti-union sentiments;

Regarding the foregoing stipulation, counsel for the General Counsel states in his brief:

... Although the affidavits of Respondent's manager and floor manager indicate that eight cooks and six waitresses expressed strong anti-union sentiments, their affidavits did not state what those statements were. Accordingly, the Regional Director was correct in determining that such self serving statements by Respondent's supervisory personnel were insufficient to support a good faith doubt of the Union's majority status.

It appears that under the present state of Board law, an employer has sufficient objective considerations to withdraw recognition from a union when at least 50 percent of the unit employees have voluntarily expressed antiunion sentiments which, collectively, may be deemed to raise a reasonable doubt regarding the Union's continuing majority status. *White Castle System, Inc.*, 224 NLRB 1089 (1976); *Faye Nursing Home, Inc., d/b/a Green Oak Manor*, 215 NLRB 658, 664 (1974); *Sierra Development Company d/b/a Club Cal-Neva, supra*.

As noted above, Respondent's brief is silent on this matter, and offers no guidance regarding how the foregoing stipulation should be interpreted or construed, or its significance to Respondent's defense. Upon carefully considering this particular matter, I conclude that the statements contained in the managers' affidavits to the effect that half the unit employees expressed strong antiunion sentiments should be construed as tantamount to allegations, but not proof, of the alleged facts contained therein. I therefore conclude that Respondent has not sustained its burden of proof in this regard.

¹ *Petroleum Contractors, Inc.*, 250 NLRB 604, 607 (1980), enfd. 659 F.2d 1069 (3d Cir. 1981); *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), cert. denied 398 U.S. 929; *United Aircraft*, 169 NLRB 480 (1967).

² *Printers Service, Inc., Photo-Composition Service, Inc.*, 175 NLRB 809 (1969), enfd. 434 F.2d 1049 (6th Cir. 1970).

³ *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22 (1977), enfd. 604 F.2d 606 (9th Cir. 1979).

Having arrived at this conclusion, I therefore find that the poll conducted by Respondent, albeit under the guidelines of *Struksnes Construction Company, Inc.*, 165 NLRB 1062 (1967), was unlawful, as Respondent did not have sufficient objective considerations upon which to base a reasonable doubt of the Union's majority status prior to conducting the poll. See *Jackson Sportswear Corporation*, 211 NLRB 891, fn. 3 (1974); *Montgomery Ward & Co., Incorporated*, 210 NLRB 717 (1974); *Mid-Continent Refrigerated Service Company*, 228 NLRB 917, fn. 2 (1977). But cf. *Taft Broadcasting, WDAF-TV, AM-FM*, 201 NLRB 801, 803 (1973).

Respondent, in its brief, does not take issue with the appropriateness of the alleged bargaining unit. It is clear and I find that the bargaining unit, composed of all employees at the restaurant but excluding clericals, janitors, managers, owners, supervisors and guards as defined in the Act, is appropriate for the purposes of collective bargaining. Indeed, it has been recognized as such by Respondent over a 10-year period as reflected by a succession of collective-bargaining agreements.

On the basis of the foregoing, I find that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, as alleged, by unlawfully conducting a poll of its unit employees' desire for union representation, and thereafter withdrawing recognition from the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, as alleged.

THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom and that it take certain affirmative action described below, designed to effectuate the policies of the Act.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴

The Respondent, Mingtree Restaurant, Inc. d/b/a Forbidden City Restaurant, Puyallup, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 20, AFL-CIO, as exclusive bargaining representative of all its employees at its Puyallup, Washington, restaurant, but excluding clericals, janitors, managers, owners, supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 20, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described above and, if an agreement is reached, embody it in a signed contract.

(b) Post at its restaurant located in Puyallup, Washington, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."